

STATEMENT OF THE CASE

Appellants-Plaintiffs, James Bedree (Bedree) and Joseph Yovanovitch (Yovanovitch) (collectively, the Appellants), appeal the trial court's dismissal of their Complaint against Appellee-Defendant, O'Daniel Ford, Inc. (O'Daniel), in which they assert alternative claims of fraud and mutual mistake in the sale of a vehicle.

We affirm.

ISSUE

Appellants raise three issues on appeal which we consolidate and restate as the following single issue: Whether the trial court erred in dismissing Appellants' Complaint based on the doctrine of *res judicata*.

FACTS AND PROCEDURAL HISTORY

On April 5, 2002, Ford Motor Credit Company filed a Complaint against Bedree to recover on a vehicle installment contract (First Lawsuit). In response to the Complaint, Bedree and Yovanovitch filed their "Counter Claim and Answer." (Appellant's App. p. 45). This Counter Claim and Answer, signed by both Appellants, added Yovanovitch and O'Daniel to the caption of the case, and alleged that O'Daniel had committed fraud and made misrepresentations to Appellants in connection with the sale of a vehicle.

On May 15, 2002, O'Daniel filed a Motion to Dismiss Appellants' claims based on noncompliance with Ind. Trial Rule 9(B). Thereafter, on June 25, 2002, Appellants filed an "Amended Counter Claim and Answer," correcting its T.R. 9(B) deficiencies and again alleging fraud and misrepresentations against O'Daniel. On July 15, 2002,

O'Daniel filed a second Motion to Dismiss Appellants' claim with prejudice, which was granted by the trial court on December 16, 2002. Subsequently, on March 29, 2004, Appellants filed a Motion for Leave of Court to File Counterclaim and Third-Party Complaint and to Add Additional Third-Party Defendant and to Add Additional Party as Counterclaimant. The Motion sought to re-add O'Daniel as a party to the First Lawsuit, reassert Appellants' fraud claims against O'Daniel and institute a Third-Party Complaint, alleging that Appellants purchased a vehicle from O'Daniel in reliance upon O'Daniel's misrepresentations. On June 18, 2004, the trial court denied Appellants' motion.

On March 3, 2005, Appellants filed their Complaint against O'Daniel in the present cause (Second Lawsuit). The Complaint asserted the alternative claims of fraudulent representations during the purchase of a vehicle and mutual mistake. On April 27, 2005, O'Daniel filed its Motion to Dismiss based on the doctrine of *res judicata*. After a hearing on O'Daniel's motion, the trial court dismissed Appellants' Complaint.

Appellants now appeal. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Appellants contend that the trial court erred in dismissing their Complaint based on the doctrine of *res judicata*. Appellants present us with a two-fold argument: (1) Whether the trial court's Order of Dismissal bars Yovanovitch's claims when he was not formally made a party to the First Lawsuit; and (2) Whether the trial court in effect dismissed Appellants' claims with prejudice when the trial court failed to make this determination in its Order.

I. Standard of Review

Generally, the review of a dismissal pursuant to T.R. 12(B)(6) is *de novo*, requiring no deference to the trial court's decision. *Richter v. Asbestos Insulating & Roofing*, 790 N.E.2d 1000, 1002 (Ind. Ct. App. 2003), *trans. denied*. A motion to dismiss based upon T.R. 12(B)(6) tests the legal sufficiency of a claim, not the facts supporting it. *Id.* The standard to be applied is that a complaint is subject to dismissal only when it appears to be a certainty that the plaintiff would not be entitled to relief under any set of facts. *Id.* Matters outside the pleadings cannot be considered; if matters outside the pleadings are presented to and not excluded by the trial court the motion becomes one for summary judgment. Ind. T.R. 12(B), *see also id.*

Here, Appellants note, and O'Daniel does not appear to contest, that the trial court improperly considered matters outside of the pleadings in granting O'Daniel's Motion to Dismiss. Our review of the record shows that initially Appellants objected to the introduction of extraneous evidence by O'Daniel. Even though the trial court overruled Appellants' objection, it nevertheless allowed both parties to reference matters outside the pleadings later in the hearing. However, we have previously established that when the trial court affords the parties a reasonable opportunity to present external material, the failure to specifically designate a motion as one for summary judgment instead of a dismissal under T.R. 12(B)(6) is deemed harmless error. *Murphy Breeding Laboratory, Inc. v. West Central Conservancy Dist.*, 828 N.E.2d 923, 926-27 (Ind. Ct. App. 2005). In this light, the record reflects numerous opportunities for both parties to present extraneous evidence. Thus, we will review this case as arising from a grant of summary judgment. *See id.*

Our standard of review for summary judgment is well settled. Upon appeal, we apply the same standard as the trial court and resolve disputed facts or inferences in favor of the non-moving party. *Id.* at 927. The moving party bears the burden of establishing prima facie that no genuine issue of material fact exists and that he or she is entitled to judgment as a matter of law. *Id.* Once the moving party has met this burden, the burden falls upon the non-moving party to set forth specific facts demonstrating a genuine issue for trial. *Id.* The party appealing a grant of summary judgment bears the burden of persuading us that the trial court erred. *Id.* If the trial court's entry of summary judgment can be sustained upon any theory or basis in the record, we must affirm. *Id.*

II. *Res Judicata*

We begin our analysis of Appellants' claims by noting that the doctrine of *res judicata* bars the repetitious litigation of disputes that are essentially the same. *French v. French*, 821 N.E.2d 891, 896 (Ind. Ct. App. 2005), *reh'g denied*. The principle of *res judicata* is divided into two branches: claim preclusion and issue preclusion, also referred to as collateral estoppel. *Id.* Appellants' appeal only involves claim preclusion.

Claim preclusion applies where a final judgment on the merits has been rendered and acts as a complete bar to a subsequent action on the same issue or claim between those parties and their privies. *Indianapolis Downs, LLC v. Herr*, 834 N.E.2d 699, 703 (Ind. Ct. App. 2005), *trans. denied*. When claim preclusion applies, all matters that were or might have been litigated are deemed conclusively decided by the judgment in the prior action. The following four requirements must be satisfied for a claim to be precluded under the doctrine of *res judicata*: (1) the former judgment must have been

rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was, or could have been, determined in the prior action; and (4) the controversy adjudicated in the former action must have been between the parties to the present suit or their privies. *Id.* In the case before us, Appellants develop their contentions around the identity of the parties and the purported merits of the judgment in the First Lawsuit.

A. *Yovanovitch's claims*

Appellants first argue that the trial court's Order is not barred by *res judicata* because Yovanovitch was not a party in the First Lawsuit. Specifically, they maintain that even though Yovanovitch signed and filed a Counterclaim and Answer in response to O'Daniel's Complaint in the First Lawsuit, Yovanovitch was never properly added to the cause pursuant to Indiana's trial rules, and thus, the trial court lacked jurisdiction to adjudicate Yovanovitch's claims.

In general, jurisdiction embraces three essential elements: jurisdiction of the subject matter, jurisdiction of the person, and jurisdiction of the particular case. *Foor v. Town of Hebron*, 742 N.E.2d 545, 548 (Ind. Ct. App. 2001). Subject matter jurisdiction is the power of a court to hear a particular case within the class of cases. *Id.* A judgment rendered by a court lacking subject matter jurisdiction is void and may be attacked at any time. *Id.* In contrast, a judgment rendered by a court lacking jurisdiction over the particular case is voidable and must be timely objected to or it is waived. *Id.* The third element, personal jurisdiction comprises the court's power to bring a person into its adjudicative process and render a valid judgment over him or her. *In re Estate of Baker*,

837 N.E.2d 603, 608 (Ind. Ct. App. 2005). The assertion that a court lacks personal jurisdiction must be timely raised or it is waived. *State v. Omega Painting, Inc.*, 463 N.E.2d 287, 290-91 (Ind. Ct. App. 1984), *reh'g denied*.

In the case at bar, it is unclear whether Yovanovitch disputes the trial court's personal jurisdiction over him or its jurisdiction over his particular claims. Nevertheless, the result is the same. The record supports that in response to the Complaint filed against Bedree in the First Lawsuit, Bedree and Yovanovitch filed their Counter Claim and Answer. Both Bedree and Yovanovitch signed and certified the document. After O'Daniel filed its Motion to Dismiss Counterclaim on May 15, 2002 based on Appellants' failure to comply with T.R. 9(B), Appellants filed an Amended Counter Claim and Answer on June 25, 2002. Even though only Bedree signed the amended motion, Yovanovitch was listed as a co-plaintiff in the motion's caption, and relief was requested for both Appellants. Subsequently, the trial court dismissed the case on December 16, 2002, listing Bedree and Yovanovitch as counter-plaintiffs.

Based on the abundance of filings in the First Lawsuit, we conclude that Yovanovitch has waived any argument pertaining to the jurisdiction of the trial court to determine his rights in the First Lawsuit. As any issues regarding a trial court's personal jurisdiction or jurisdiction over a particular case must be invoked at "the earliest opportunity," Yovanovitch cannot now, after the conclusion of the First Lawsuit, be heard to complain. *See Foor*, 742 N.E.2d at 549.

Moreover, Yovanovitch voluntarily submitted to the trial court's jurisdiction by invoking the trial court's affirmative authority when they sought relief from alleged

misrepresentations made by O'Daniel. It is well-established that “a party shall be estopped from challenging the court’s jurisdiction where the party has voluntarily availed itself or sought the benefits of the court’s jurisdiction.” *Kondamuri v. Kondamuri*, 799 N.E.2d 1153, 1159 (Ind. Ct. App. 2003), *trans. denied*; *see also Glasscock v. Corliss*, 823 N.E.2d 748, 755 (Ind. Ct. App. 2005), *reh’g denied, trans. denied*. Accordingly, Yovanovitch has now waived any challenges to the trial court’s personal jurisdiction or its authority over his claims in the First Lawsuit.

B. *Dismissal with Prejudice*

Next, Appellants contend that their claims are not barred by *res judicata* because the trial court’s Dismissal Order in the First Lawsuit omitted to state that the case was dismissed with prejudice. Thus, Appellants maintain that the First Lawsuit was not decided on its merits. We are not persuaded.

Generally, either party may move to dismiss a claim and a dismissal with prejudice constitutes a dismissal on the merits. *Richter*, 790 N.E.2d at 1002. Therefore, a dismissal with prejudice is conclusive of the rights of the parties and is *res judicata* as to any questions that might have been litigated. *Id.* at 1003. Here, however, the trial court’s Order of Dismissal is silent as to the character of its dismissal. Specifically, the trial court’s Order reads, in pertinent part:

After considering the motions and the argument presented, the [c]ourt now finds that the counter-claim fails to comply with the requirements of Trial Rule 9(B) in that it does not specifically plead all averments of fraud.

Accordingly, the motions to dismiss are well taken and should be granted.

(Appellants’ App. p. 74).

In this regard, T.R. 41(B) states that “[u]nless the court in its order for dismissal otherwise specifies, a dismissal under . . . subdivision (E) of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.” Clearly this means that unless the trial court indicates that the dismissal is without prejudice, it must be deemed to be with prejudice. As the order in the instant case is silent, it must thus be deemed that the trial court’s order was a dismissal with prejudice.

Furthermore, even disregarding the trial rules’ presumption of dismissal, we would reach the same conclusion. The explicit language of the trial court’s order states that the “motions to dismiss are well taken and should be granted.” (Appellant’s App. p. 74). Reviewing O’Daniel’s motion to dismiss and its brief in support of its motion, the caption in both documents explicitly requests the trial court to dismiss Appellants claims with prejudice. Unlike Appellants, we find that the fact that the trial court used its own Order of Dismissal instead of adopting O’Daniel’s purportedly filed proposed order to be irrelevant. Accordingly, based on the evidence before us, we affirm the trial court’s Order barring Appellants’ claims on the basis of *res judicata*.¹

CONCLUSION

¹ We note that Appellants in their reply brief raise a new issue, claiming that O’Daniel’s failure to provide a transcript of prior proceedings upon which a defense of *res judicata* is based amounts to a fatal error. However, as an issue not raised in an appellant’s brief may not be raised for the first time in a reply brief, we regard Appellants’ contention waived for our review. *Chupp v. State*, 830 N.E.2d 119, 126 (Ind. Ct. App. 2005) (quoting *James v. State*, 716 N.E.2d 935, 940 n.5 (Ind. 1999)).

Based on the foregoing, we find that the trial court properly dismissed Appellants' Complaint based on the doctrine of *res judicata* because Yovanovitch was a party in the First Lawsuit which was dismissed with prejudice.

Affirmed.

BAILEY, J., and MAY, J., concur.